

PETER CONGO,

Plaintiff,

v.

NATIONWIDE MUTUAL INSURANCE
COMPANY,

Defendant.

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FRACZKOWSKI, J.

Plaintiff Peter Congo (herein "Plaintiff" or "Congo") filed a claim against Defendant Nationwide Mutual Insurance Company (herein "Defendant" or "Nationwide") for damages he claims are due under a motor vehicle insurance policy issued by Defendant for loss of his vehicle which was destroyed in a fire.¹ Nationwide denied coverage for several reasons.

Trial was held on June 27, 2011. The Court reserved decision and ordered the parties to submit memoranda in support of their respective positions. The parties agreed that damages, if found due, would be set at an agreed amount. This is the Court's Final Decision and Order.

FACTS

The Court concludes that the record supports the following findings of fact.

Congo was the owner of a 2007 Dodge Charger, which he had customized with various additions of equipment. He insured the vehicle with Nationwide. The parties do not dispute that coverage was in effect on the date of the alleged loss.

On May 30, 2009, Congo, with a friend as passenger, drove the vehicle from Wilmington in a southbound direction down Route 13.² Along the way, Congo alleges that someone fired shots at the vehicle. He continued to drive down Route 13 and stopped at a gas station/convenience market (WaWa) where he examined the damage caused by the shots.

¹ Originally Plaintiff filed suit against Nationwide and Travelers Home and Marine Insurance Company (herein "Travelers"), alleging that both Defendant carriers insured the vehicle and its' contents. *See* Plaintiff's Complaint, at ¶ 2. However, by stipulation dated January 12, 2011, Plaintiff dismissed the claim against Travelers with prejudice.

² Witness testimony also suggested that a third passenger, Plaintiff's cousin Marquis Smith, may have been in the Plaintiff's vehicle.

He testified that he called witness Tarra Reed ("Reed"), his girlfriend at the time, and told her of the incident. Congo then drove back to Wilmington and parked the vehicle at the curb at 2606 N. Harrison Street, where Reed resided. The headquarters of the New Castle County Police Department is along the route that he traveled. He did not stop at the police station.³ Congo saw evidence of gasoline leaking at the rear of the parked vehicle. Several other persons also witnessed this leakage. Plaintiff testified that photographs were taken of gas dripping from the rear wheel axle and gas leaking out all over the street.⁴ Congo did not call the police or the fire department. Instead, he went into the house where he watched television with Reed. He remained there according to one witness for "at least a half hour, if not longer." She recalled it being a "significant amount of time." This witness also recalled seeing "a lot of gas leaking" and expressed concern about the gas because cigarettes or other flame sources could ignite the gas. Reed testified that when they went into the house the car was intact.

Congo was still in the house when the fire started. He and other persons ran out of the house when shouts were heard announcing the fire. The fire department was called and the fire was extinguished. The vehicle was a total loss.

Congo filed a claim for the loss. Nationwide demurred and would not pay for any loss. Nationwide's position became firm after its expert, Richard O'Brien, examined the remains of the vehicle.

³ Plaintiff testified that it did not even occur to him to go to the police station.

⁴ See Plaintiff's Exhibits # 3 and # 4.

O'Brien concluded and opined that the fire was not caused by gas leakage under the vehicle but, rather, the fire originated on the rear trunk of the vehicle and was ignited by a flammable substance having been introduced to the top of the trunk.⁵ O'Brien was qualified as an expert and his testimony reiterated his findings following inspection of the subject vehicle. Congo did not introduce any expert evidence as to the source and cause of the fire. There was no evidence showing that Congo caused the fire to start or that anyone caused the start of the fire at his direction.

DISCUSSION AND FINDINGS

This Court must decide whether Nationwide breached a contractual obligation to Congo under an automobile policy by its refusal to pay for property loss sustained after the fire destroyed his vehicle. The Court, as the trier of fact, must weigh the evidence as presented and make credibility determinations.⁶ Congo bears the burden to prove his claims by a preponderance of the evidence. The side on which the greater weight of the evidence is found is the side on which the preponderance of the evidence exists.⁷

Nationwide's first defense was that Congo's claim for property damage was barred by an applicable policy exclusion.

⁵ Nationwide introduced photographs, without objection, to support the defense theory. *See* Defendant's Exhibits # 1 through # 12.

⁶ *Richardson v. A & A Air Services, Inc.*, 2007 WL 2473284, *1, *5 (Del. Super. Ct. July 31, 2007); *See also* Delaware Superior Court Pattern Jury Instruction § 23.9 "Credibility of Witnesses -- Weighing Conflicting Testimony."

⁷ *Reynolds v. Reynolds*, 237 A.2d 708, 711 (Del. 1967).

The Victoria Insurance Delaware Private Passenger Automobile Policy ("Nationwide Policy" or "Policy"),⁸ submitted with Defendant's post-trial memorandum without objection and by agreement at trial, defines the terms and conditions of the Policy. Specifically, Subsection 11 of the "Coverage Exclusions" provision, at page 3 of the Policy, precludes coverage for any loss "[c]aused intentionally by or at the direction of you or a relative, including willful acts the result of which that person knows or ought to know will follow from their conduct." While Nationwide does not refer to it as such, this exclusion is generally referred to as the "intentional act" exclusion.⁹ As the parties do not dispute the validity of the insurance policy, the burden of proof as to whether the claim falls within an exclusion lies with Nationwide.¹⁰ Nationwide through its expert, O'Brien, demonstrated that the fire which destroyed the vehicle did not start as Congo suggested. Congo's evidence was basically that he parked the vehicle on North Harrison Street in Wilmington; that he and others saw gas under the rear of the vehicle, which he claims leaked from the vehicle because of damage caused when shots were fired at his vehicle on Route 13. He then showed that a fire started in the car while he was in the house where he had parked and that he called the fire department to extinguish the fire which destroyed the vehicle.

Congo argues that this scenario dictates that he is entitled to be compensated for his loss. He stresses that there is no evidence showing his complicity in causing the fire even if Nationwide's theory of source and causation is accepted. In essence Congo's position is that he is an innocent victim and should be made whole for his loss, irrespective of whether he

⁸ This policy was underwritten by Titan Indemnity Company -- A Nationwide Company.

⁹ *Farmer in the Dell Enterprises, Inc. v. Farmers Mutual Ins. Co.*, 514 A.2d 1097, 1099 (Del. 1986) (intentional tort exclusion in homeowner's policy barred coverage).

¹⁰ *Id.*

was, by his own admission, "negligent or foolish or just plain stupid."¹¹ Conversely, Nationwide's theory is that the fire was caused deliberately by someone, and this precludes award of any damages. Nationwide points to the "intentional act" exclusion set forth *infra* which refers to damages caused intentionally by or at the behest of the insured. But, to prevail in this argument, Nationwide would have to show some connection in the causation of the fire to Congo. There is nothing in the record to show this. Accordingly, the Court is not persuaded that Nationwide met its burden of establishing this exclusion.

Thus, if all else was equal, Congo should prevail on his claim. But, Nationwide argues, all is not otherwise equal. Nationwide avers that witness testimony adduced at trial gave rise to a second defense – a breach of the insured's obligation under the policy thereby precluding any recovery.¹²

To prove the contractual liability of an insurer for an alleged breach of an insurance agreement, a Plaintiff must show that (1) there was a valid contract of insurance in force at the time of the loss; (2) the insured has complied with all conditions precedent to the insurer's obligation to make payment; and (3) the insurer has failed to make payment as required under the policy.¹³ As validity of the insurance policy is undisputed, the predominant focus turns to the second element -- whether Congo complied with all conditions explicit in the policy.

¹¹ See Plaintiff's Post Trial Memorandum dated July 14, 2011 at page 2, ¶ 4.

¹² See Defendant's Post Trial Memorandum dated July 15, 2011 at page 3; See Policy at page 1, "Insured Persons' Duties" at # 7.

¹³ *Casson v. Nationwide Ins. Co.*, 455 A.2d 361, 365 (Del. Super. Ct. 1982).

Nationwide avers that the subject Policy imposes certain duties upon the insured, one of which is the duty to protect the covered property after a loss. Nationwide maintains that Plaintiff breached that obligation when he failed to take appropriate measures to safeguard the property from further damage following the initial loss. By taking such steps in the exercise of ordinary care, Plaintiff could have prevented the fire which consumed the vehicle, and his failure in that respect should bar recovery. This Court agrees.

Delaware law recognizes the general principle that a party cannot recover damages for a loss which could have been avoided through reasonable efforts.¹⁴ Such “duty to mitigate” will be imposed upon an insured, even in absence of express mitigation clause.¹⁵ Breach of the duty to mitigate does not entitle a party to damages, but rather may prevent the claimant from recovering the portion of the loss which compliance could have avoided.¹⁶ Mitigation of loss is quite simply a matter of common sense.

Nationwide argues that Congo suffered a loss to his vehicle when it was struck with shots on Route 13. When he examined the vehicle and the damage, Congo admitted that he saw further evidence of damage when he saw the gas leaking under the car. Yet he did nothing to prevent further damage and he failed to preserve the vehicle by failing to call the fire department.

¹⁴ *Route 40 Holdings, Inc. v. Tony's Pizza & Pasta, Inc.*, 2010 WL 2161819, *1 (Del. Super. Ct. May 27, 2010) (citations omitted); see e.g. Delaware Superior Court Pattern Jury Instruction § 22.26 "Duty to Mitigate Damages -- Contract."

¹⁵ *Monsanto Co. v. Aetna Cas. and Sur. Co.*, 1993 WL 563248 (Del. Super. Ct. Dec. 9, 1993) (mitigation clause in the context of environmental harm); *E.I. du Pont de Nemours & Co. v. Allstate Ins. Co.*, 686 A.2d 152, 156 (Del. 1996) (mitigation clause in the context of environmental harm).

¹⁶ *Route 40 Holdings, Inc.*, 2010 WL 2161819 at *1.

By failing to do so, Nationwide maintains that Congo breached a condition in the policy which obligates the insured to protect the damaged property and preserve it for inspection by the insurer.

The Court finds that Nationwide's position has merit. Accepting Congo's claims at face value, he did not act in a reasonable, prudent or mature manner. It is difficult to accept a premise where a person finds his vehicle damaged and in danger of further damage or destruction by leaking gas, that the person would not take action immediately to overcome this danger by simply calling the fire department. This case is all the more disturbing because Congo says he saw what a reasonably, prudent adult person would know to be a dangerous situation, yet he went in the house and watched television, or did something else for upwards of a half hour and came out of the house only when shouts about the fire were heard.

Congo's failure to act prudently in these circumstances dictates only one result -- that he breached his duty as an insured and this absolves the insurer of an obligation to compensate him for a loss that clearly could have been averted.

CONCLUSION

Based on these findings and conclusions, the Court concludes that Nationwide properly denied responsibility for the damage claim filed by Congo.

Judgment is entered in favor of Defendant, with costs assessed against Plaintiff.

IT IS SO ORDERED.

Alfred Fraczkowski¹⁷
Associate Judge

¹⁷ Sitting by appointment pursuant to Del. Const. Art. IV, § 38 and 29 *Del. C.* § 5610.